

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRENDAN NASBY,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

Case No. 3:07-cv-00304-LRH-WGC

**ORDER**

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner. This matter comes before the Court on the merits of the petition.

**I. Procedural History**

Petitioner was convicted in the Eighth Judicial District Court for the State of Nevada, pursuant to a jury verdict of the crime of first degree murder with the use of a deadly weapon and conspiracy to commit murder. (Exhibit 2).<sup>1</sup> The judgment of conviction was filed December 2, 1999. (*Id.*). On the conspiracy count, petitioner was sentenced to 48-120 months in the custody of the Nevada Department of Corrections. (*Id.*). On the murder count, petitioner was sentenced to life with the possibility of parole, plus an equal and consecutive term of life with the possibility of parole for the use of the deadly weapon. (*Id.*).

Petitioner pursued a direct appeal, and on February 7, 2001, the Nevada Supreme Court affirmed petitioner's convictions. (Exhibit 4). Petitioner filed a post-conviction habeas petition in

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<sup>1</sup> The exhibits referenced in this order are found in the Court's record at ECF No. 34.

1 the state district court, as well as two memoranda of points and authorities in support of the petition.  
2 (Exhibits 6, 7, 8). The state district court denied the petition. (Exhibit 9). Petitioner appealed the  
3 denial of his postconviction habeas petition. (Exhibit 10). On June 18, 2007, the Nevada Supreme  
4 Court affirmed the denial of the postconviction habeas petition. (Exhibit 11). Remittitur issued on  
5 July 13, 2007. (Exhibit 12).

6 Petitioner dispatched his federal habeas petition to this Court on August 14, 2007. (ECF No.  
7 10, at p. 1). On August 17, 2007, petitioner filed a motion for the appointment of counsel. (ECF  
8 No. 5). The Federal Public Defender was appointed to represent petitioner in this action, but  
9 counsel later withdrew due to a conflict of interest. (ECF Nos. 9, 12, 14). Counsel Scott Edwards  
10 then filed a notice of appearance, but later withdrew. (ECF Nos. 15, 23, 24). The Court then  
11 appointed counsel Mary Lou Wilson to represent petitioner, but Wilson also later withdrew as  
12 counsel. (ECF No. 25, 47, 48). Petitioner now proceeds *pro se* in this action.

13 By order filed August 19, 2010, the Court found Grounds 1, 2(a), and 4 to be procedurally  
14 defaulted and dismissed those grounds with prejudice. (ECF No. 35). In the order of August 19,  
15 2010, the Court further ruled that Grounds 5, 6, and 7 were unexhausted. (*Id.*). Petitioner moved  
16 for a stay and abeyance for purposes of returning to state court to exhaust his unexhausted claims.  
17 (ECF No. 41). On November 17, 2010, the Court denied petitioner's motion for a stay and  
18 dismissed the petition with prejudice. (ECF No. 42). Judgment was entered on November 18,  
19 2010. (ECF No. 43). Petitioner sought reconsideration of the Court's order denying a stay and  
20 dismissing the petition with prejudice. (ECF No. 51).

21 On May 13, 2011, the Court granted petitioner's motion for reconsideration. (ECF No. 55).  
22 In that order, the Court dismissed with prejudice Ground 2(b) of the petition as procedurally barred.  
23 (*Id.*). The Court vacated the judgment and granted petitioner's motion for a stay pursuant to *Rhines*  
24 *v. Weber*, so that petitioner could return to state court to exhaust Grounds 5, 6, and 7. (*Id.*).  
25 Pursuant to that order, this action was administratively closed. (*Id.*).

26 Petitioner filed a second post-conviction habeas petition in the state district court on  
27 February 18, 2011. By order filed June 17, 2011, the state district court denied petitioner's second  
28 state habeas petition as untimely. On February 8, 2012, the Nevada Supreme Court affirmed the

1 denial of petitioner's second state habeas petition as untimely, successive, abuse of the writ, and  
 2 barred by laches. (ECF No. 63). Remittitur issued on March 5, 2012.

3 On April 19, 2012, the Court granted petitioner's motion to reopen the case. (ECF No. 62).  
 4 Respondents have filed an answer to the remaining grounds of the petition. (ECF No. 67).  
 5 Petitioner has filed a reply to the answer. (ECF No. 74).

## 6 **II. Federal Habeas Corpus Standards**

7 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),  
 8 provides the legal standard for the Court's consideration of this habeas petition:

9 An application for a writ of habeas corpus on behalf of a person in  
 10 custody pursuant to the judgment of a State court shall not be granted  
 11 with respect to any claim that was adjudicated on the merits in State  
 12 court proceedings unless the adjudication of the claim –

13 (1) resulted in a decision that was contrary to, or involved an  
 14 unreasonable application of, clearly established Federal law, as  
 15 determined by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable  
 17 determination of the facts in light of the evidence presented in the  
 18 State court proceeding.

19 The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications  
 20 in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect  
 21 to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court  
 22 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28  
 23 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the  
 24 Supreme Court's] cases" or "if the state court confronts a set of facts that are materially  
 25 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
 26 different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
 27 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685,  
 28 694 (2002)). The formidable standard set forth in section 2254(d) reflects the view that habeas  
 corpus is "a guard against extreme malfunctions in the state criminal justice systems,' not a  
 substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. \_\_\_, \_\_\_,  
 131 S.Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

1 A state court decision is an unreasonable application of clearly established Supreme Court  
 2 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct  
 3 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that  
 4 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,  
 5 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more  
 6 than merely incorrect or erroneous; the state court’s application of clearly established federal law  
 7 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining whether  
 8 a state court decision is contrary to, or an unreasonable application of federal law, this Court looks  
 9 to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);  
 10 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9<sup>th</sup> Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

11 In a federal habeas proceeding, “a determination of a factual issue made by a State court  
 12 shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the  
 13 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). If a claim  
 14 has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the  
 15 burden set in § 2254(d) and (e) on the record that was before the state court. *Cullen v. Pinholster*,  
 16 131 S.Ct. 1388, 1400 (2011).

### 17 **III. Discussion**

#### 18 **A. Ground 3**

19 Petitioner alleges that he received ineffective assistance of counsel in seven sub-claims  
 20 within Ground 3. Specifically, petitioner alleges that: (1) Trial counsel was ineffective for failing  
 21 to call any witnesses regarding an alibi, including Crystal Sobrian; (2) trial counsel was ineffective  
 22 for failing to call any witnesses in rebuttal of the State’s allegations of witness intimidation,  
 23 including Porsche Nichols, or in support of Von Lewis’ having threatened to kill the victim with a  
 24 gun, including Madison Jones or Michelle McKinnon; (3) trial counsel had a conflict of interest  
 25 after accepting employment with the public defender and waiting until after the sentencing to inform  
 26 the court of the conflict based on the public defender’s having represented two co-defendants; (4)  
 27 trial counsel was ineffective for failing to investigate the defense and to present any evidence,  
 28 including a videotape depicting Von Lewis threatening the victim with a gun, and trial counsel did

1 not notify the court after seeing the State intimidate a defense witness; (5) trial counsel was  
2 ineffective for failing to object to the accomplice instructions, failing to object to the court's failure  
3 to issue cautionary accomplice instructions, and failing to object when counsel for the State  
4 improperly vouched for witnesses; (6) trial counsel was ineffective for failing to allow the petitioner  
5 to testify at trial when he desired to do so; and (7) appellate counsel was ineffective for not raising  
6 the other sub-claims of Ground 3 on direct appeal.<sup>2</sup> (Petition, ECF No. 10, at pp. 7A-7C).

7 Ineffective assistance of counsel claims are governed by the two-part test announced in  
8 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a  
9 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1)  
10 counsel's performance was unreasonably deficient, and (2) that the deficient performance prejudiced  
11 the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687).  
12 To establish ineffectiveness, the defendant must show that counsel's representation fell below an  
13 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there  
14 is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding  
15 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine  
16 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be  
17 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in  
18 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's  
19 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.  
20 *Id.*

21 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
22 performance of counsel resulting in prejudice, "with performance being measured against an  
23 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*  
24 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an  
25 ineffective assistance claim, a federal habeas court may only grant relief if that decision was  
26 contrary to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*,

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28 <sup>2</sup> Sub-claims 1-7 are referenced in the petition as sub-claims A-G. (ECF No. 10).

1 540 U.S. 1, 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide  
 2 range of reasonable professional assistance. *Id.*

3 The United States Supreme Court has described federal review of a state supreme court’s  
 4 decision on a claim of ineffective assistance of counsel as “doubly deferential.” *Cullen v.*  
 5 *Pinholster*, 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 112-113,  
 6 129 S.Ct. 1411, 1413 (2009)). In *Cullen v. Pinholster*, the Supreme Court emphasized that: “We  
 7 take a ‘highly deferential’ look at counsel’s performance . . . through the ‘deferential lens of §  
 8 2254(d).” *Id.* at 1403 (internal citations omitted). Moreover, federal habeas review of an  
 9 ineffective assistance of counsel claim is limited to the record before the state court that adjudicated  
 10 the claim on the merits. *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401. The United States Supreme  
 11 Court has specifically reaffirmed the extensive deference owed to a state court’s decision regarding  
 12 claims of ineffective assistance of counsel:

13 Establishing that a state court’s application of *Strickland* was  
 14 unreasonable under § 2254(d) is all the more difficult. The standards  
 15 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.*  
 16 at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117  
 17 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in  
 18 tandem, review is “doubly” so, *Knowles*, 556 U.S. at \_\_\_, 129 S.Ct. at  
 19 1420. The *Strickland* standard is a general one, so the range of  
 reasonable applications is substantial. 556 U.S. at \_\_\_, 129 S.Ct. at  
 1420. Federal habeas courts must guard against the danger of  
 equating unreasonableness under *Strickland* with unreasonableness  
 under § 2254(d). When § 2254(d) applies, the question is whether  
 there is any reasonable argument that counsel satisfied *Strickland*’s  
 deferential standard.

20 *Harrington v. Richter*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 788 (2011). “A court considering a claim of  
 21 ineffective assistance of counsel must apply a ‘strong presumption’ that counsel’s representation  
 22 was within the ‘wide range’ of reasonable professional assistance.” *Id.* at 787 (quoting *Strickland*,  
 23 466 U.S. at 689). “The question is whether an attorney’s representation amounted to incompetence  
 24 under prevailing professional norms, not whether it deviated from best practices or most common  
 25 custom.” *Id.* (internal quotations and citations omitted).

26 The *Strickland* standard also applies to claims of ineffective appellate counsel. *Smith v.*  
 27 *Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has no constitutional duty to raise every non-  
 28 frivolous issue requested by the client. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). To state a

1 claim of ineffective assistance of appellate counsel, a petitioner must demonstrate: (1) that counsel's  
2 performance was deficient in that it fell below an objective standard of reasonableness, and (2) that  
3 the resulting prejudice was such that the omitted issue would have a reasonable probability of  
4 success on appeal. *Id.* "Experienced advocates since time beyond memory have emphasized the  
5 importance of winnowing out weaker arguments on appeal and focusing on one central issue if  
6 possible, or at most on a few key issues. *Id.* at 751-52. Petitioner must show that his counsel  
7 unreasonably failed to discover and file nonfrivolous issues. *Delgado v. Lewis*, 223 F.3d 976, 980  
8 (9<sup>th</sup> Cir. 2000). It is inappropriate to focus on what could have been done rather than focusing on  
9 the reasonableness of what counsel did. *Williams v. Woodford*, 384 F.3d 567, 616 (9<sup>th</sup> Cir. 2004)  
10 (citation omitted).

### 11 **1. Sub-Claim 1**

12 Petitioner alleges that trial counsel was ineffective for failing to call any witnesses regarding  
13 an alibi, including Crystal Sobrian. The Nevada Supreme Court rejected this claim, as follows:

14 Nasby claimed that trial counsel, Joseph Sciscento and Frederick  
15 Santacroce, were ineffective for failing to call three witnesses whom  
16 Nasby claimed would have given him an alibi. At the evidentiary  
17 hearing, counsel testified that they were prepared to call these  
18 witnesses at trial, but before trial they were given a letter Nasby had  
19 written from jail that suggested Nasby was concocting his alibi.  
20 Counsel testified that they suspected the witnesses might give false  
21 testimony if called, and they could not ethically call them. Nasby also  
22 claimed counsel were ineffective for failing to re-interview these  
23 witnesses to investigate whether he in fact concocted the alibi. Nasby  
24 failed to demonstrate that counsel's re-interview of the alibi  
25 witnesses, whom Mr. Sciscento testified he had previously  
26 interviewed, would have negated counsel's concerns. We conclude  
27 that the district court did not err in denying this claim.

28 Next, Nasby claimed that trial counsel were ineffective for not  
obtaining an earlier ruling on the admissibility of the letter referenced  
above. Nasby argued that failing to obtain a ruling allowed the State  
to reference the letter in opening argument and accuse Nasby by  
concocting an alibi. Nasby also claimed counsel were ineffective for  
failing to move to strike the State's reference to the letter after the  
district court ruled the letter inadmissible. Even assuming counsel  
were deficient in this regard, Nasby failed to demonstrate prejudice.  
We concluded in his direct appeal that the State's reference to the  
letter was not unfairly prejudicial. We therefore conclude that the  
district court did not err in denying this claim.



(Exhibit 11, at pp. 3-4). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). The Nevada Supreme Court cited to and reasonably applied the appropriate federal standard to petitioner's ineffectiveness of counsel claims. Petitioner has failed to demonstrate that his counsel's performance was deficient or that he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This Court denies habeas relief as to Ground 3, sub-claim 1.

## 2. Sub-Claim 2

Petitioner alleges that trial counsel was ineffective for failing to call any witnesses in rebuttal of the State's allegations of witness intimidation, including Porsche Nichols, or in support of Von Lewis' having threatened to kill the victim with a gun, including Madison Jones or Michelle McKinnon. The Nevada Supreme Court rejected this claim, as follows:

Nasby also claimed that trial counsel were ineffective for failing to call Porsche Nichols to contradict Brittney Adams' testimony. Adams testified that Nasby wanted her to kill Tanesha Banks, who apparently was blaming Nasby for the murder. Our review of the record, including a transcript of a police interview of Nichols, reveals that Nichols' statement, while not as thorough as Adams' testimony, did not contradict it. Nasby also claimed counsel should have located and called Madison Jones and Michelle McKinnon to testify that they saw Charles Von Lewis threaten the victim with a gun. Nasby's defense was Von Lewis, not Nasby, was the killer. Nasby's assertion that these witnesses were available to trial counsel and would have so testified has no factual support in the record. We conclude that the district court did not err in rejecting these claims.

(Exhibit 11, at p. 4). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). The Nevada Supreme Court cited to and reasonably applied the appropriate federal standard to petitioner's ineffectiveness of counsel claim. Petitioner has failed to demonstrate that his counsel's performance was deficient or that he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that



the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This Court denies habeas relief as to Ground 3, sub-claim 2.

### 3. Sub-Claim 3

Petitioner alleges that trial counsel had a conflict of interest after accepting employment with the public defender and waiting until after the sentencing to inform the court of the conflict based on the public defender's having represented two co-defendants. The Nevada Supreme Court reviewed and rejected this claim, as follows:

Nasby also claimed that trial counsel Joseph Sciscento was ineffective for representing him despite an alleged conflict of interest. Specifically, Nasby argued that a conflict arose when Sciscento accepted a position with the Special Public Defender, who represented one of Nasby's alleged coconspirators. Evidentiary hearing testimony established that Mr. Sciscento's agreement with the Special Public Defender allowed him to finish his existing cases. Mr. Sciscento testified that his files on this matter were kept in his private office, not at the Special Public Defender's office, that he performed his work on this case in his private office, and that he did not discuss this case with anyone at the Special Public Defender's office. The district court concluded that Mr. Sciscento did not have a conflict of interest. We conclude that the district court did not err in rejecting this claim.

(Exhibit 11, at pp. 4-5). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). The Nevada Supreme Court cited to and reasonably applied the appropriate federal standard to petitioner's ineffectiveness of counsel claim. Petitioner has failed to demonstrate that his counsel's performance was deficient due to a conflict of interest or that he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This Court denies habeas relief as to Ground 3, sub-claim 3.

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#### 4. Sub-Claim 4

Petitioner claims that trial counsel was ineffective for failing to investigate the defense and to present any evidence, including a videotape depicting Von Lewis threatening the victim with a gun. Petitioner also alleges that trial counsel did not notify the court after seeing the State intimidate a defense witness. The Nevada Supreme Court rejected these arguments:

Nasby next claimed that trial counsel was ineffective for failing to show the jury a videotape of Charles Von Lewis threatening the victim with a gun. At the evidentiary hearing, counsel testified that the videotape also contained imaging damaging to Nasby, including Nasby waving a gun around and “making comments.” The record makes clear that counsel made a tactical decision not to show the videotape in order to avoid potential prejudice to their client. Counsel’s tactical decisions are virtually unchallengeable absent extraordinary circumstances, which are not present here. We conclude that the district court did not err in rejecting this claim.

Nasby further claimed that trial counsel were ineffective for not advising the district court that the prosecutor had shown Colleen Warner, one of his alibi witnesses, a letter from Nasby to Crystal Sobrian, in which Nasby disparaged and threatened Warner. Nasby claimed the prosecutor showed Warner the letter in an effort to convince her not to testify on Nasby’s behalf. Nasby’s claim that the State’s action was in violation of a district court order is not supported by the record; the record reveals that before trial the prosecutor suggested he might use the letter in his case in chief. The court said that if he did so, Nasby’s comments about Warner should be redacted. The prosecutor said he wanted to present “that information to [Warner] and see how she feels about him at this point,” to which the district court responded, “I don’t know about that.” There was no order from the district court that the information not be disclosed outside the jury’s presence. We conclude the district court did not err in rejecting the claim.

(Exhibit 11, at pp. 5-6). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the state court’s findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). The Nevada Supreme Court cited to and reasonably applied the appropriate federal standard to petitioner’s ineffectiveness of counsel claims. Petitioner has failed to demonstrate that his counsel’s performance was deficient or that he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court’s ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling

1 was based on an unreasonable determination of the facts in light of the evidence presented in the  
2 state court proceeding. This Court denies habeas relief as to Ground 3, sub-claim 4.

3 **5. Sub-Claim 5**

4 Petitioner alleges that trial counsel was ineffective for failing to object to the accomplice  
5 instruction and failing to object to the court's failure to issue cautionary accomplice instructions.  
6 Petitioner also alleges that his counsel was ineffective for failing to object when counsel for the  
7 State improperly vouched for witnesses. The Nevada Supreme Court considered and rejected these  
8 claims. As to the claim that counsel was ineffective regarding the accomplice instructions, the  
9 Nevada Supreme Court held as follows:

10 Nasby next claimed that trial counsel were ineffective for failing to  
11 request an accomplice-testimony instruction and failing to object to  
12 the district court's failure to give such an instruction. He failed to  
13 support this claim with any citation to the record or relevant legal  
14 authority. It is appellant's responsibility to present relevant authority  
15 and cogent argument; issues not so presented need not be addressed  
16 by this court. Even if counsel were deficient in this regard, Nasby  
17 failed to demonstrate prejudice in light of the fact that two witnesses  
18 testified that Nasby confessed to killing the victim and the murder  
19 weapon was found in his bedroom. We conclude the district court did  
20 not err in rejecting this claim.

21 (Exhibit 11, at p. 6). As to the claim that counsel was ineffective for failing to object to the  
22 prosecution improperly vouching for witnesses, the Nevada Supreme Court ruled as follows:

23 Next, Nasby claimed that trial counsel were ineffective for failing to  
24 object to the prosecution's vouching for witnesses and misinforming  
25 the jury on the law on conspiracy, accomplice liability, and/or  
26 accessory. Nasby provided no citations to the record or legal authority  
27 to support these allegations. It is appellant's responsibility to present  
28 relevant authority and cogent argument; issues not so presented need  
not be addressed by this court. We note that the jury was properly  
instructed on the definition of conspiracy. We conclude the district  
court did not err in rejecting this claim.

(Exhibit 11, at pp. 6-7). Petitioner's allegations in the federal petition contain no more specificity  
than those asserted in the state habeas petition. The factual findings of the state court are presumed  
correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the presumption that the  
state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). Petitioner  
has failed to demonstrate that his counsel's performance was deficient or that he was prejudiced

1 under *Strickland*. Petitioner has failed to meet his burden of proving that the Nevada Supreme  
2 Court's ruling was contrary to, or involved an unreasonable application of, clearly established  
3 federal law, as determined by the United States Supreme Court, or that the ruling was based on an  
4 unreasonable determination of the facts in light of the evidence presented in the state court  
5 proceeding. This Court denies habeas relief as to Ground 3, sub-claim 5.

#### 6 **6. Sub-Claim 6**

7 Petitioner alleges that trial counsel was ineffective for failing to allow the petitioner to testify  
8 at trial when he desired to do so. The Nevada Supreme Court rejected petitioner's claim, as follows:  
9 "Nasby also claimed that trial counsel were ineffective for refusing to allow him to testify. He fails  
10 to cite to anything in the record indicating he wanted to testify and counsel prevented him from  
11 doing so." (Exhibit 11, at p. 7). Petitioner's allegations in the federal petition contain no more  
12 detail than what was asserted in the state habeas petition. The factual findings of the state court are  
13 presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory allegations will not overcome the  
14 presumption that the state court's findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup>  
15 Cir. 2000). Petitioner has failed to demonstrate that his counsel's performance was deficient or that  
16 he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that the  
17 Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly  
18 established federal law, as determined by the United States Supreme Court, or that the ruling was  
19 based on an unreasonable determination of the facts in light of the evidence presented in the state  
20 court proceeding. This Court denies habeas relief as to Ground 3, sub-claim 6.

#### 21 **7. Sub-Claim 7**

22 Petitioner alleges that appellate counsel was ineffective for not raising the other sub-claims  
23 of Ground 3 on direct appeal. The Nevada Supreme Court rejected petitioner's claim that appellate  
24 counsel was ineffective: "Nasby also made a general claim that appellate counsel was ineffective  
25 'for failure to raise all the meritorious issues in this memorandum of law.' Nasby failed to cite to  
26 the record or provide cogent argument or legal authority for how appellate counsel's performance  
27 was deficient and prejudiced him." (Exhibit 11, at p. 8). Petitioner's allegations of ineffective  
28 assistance of appellate counsel in the federal petition are bald and unsupported by facts or law. The

1 factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory  
2 allegations will not overcome the presumption that the state court's findings are correct. *Bragg v.*  
3 *Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). Petitioner has failed to demonstrate that his appellate  
4 counsel's performance was deficient or that he was prejudiced under *Strickland*. Petitioner has  
5 failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or  
6 involved an unreasonable application of, clearly established federal law, as determined by the  
7 United States Supreme Court, or that the ruling was based on an unreasonable determination of the  
8 facts in light of the evidence presented in the state court proceeding. This Court denies habeas relief  
9 as to Ground 3, sub-claim 7.

## 10 **B. Grounds 5, 6, and 7**

### 11 **1. Grounds 5, 6, and 7 Were Procedurally Defaulted in State Court**

12 In Ground 5, petitioner alleges that there was no corroborating evidence for the State's  
13 witness, thus invalidating his conviction for murder and conspiracy. (Petition, at p. 11). In Ground  
14 6, petitioner alleges that his due process rights were violated because the trial court erred in failing  
15 to provide a cautionary instruction to the jury regarding accomplice testimony. (Petition, at p. 13).  
16 In Ground 7, petitioner alleges that the trial court gave an erroneous "*Kazalyn* instruction" regarding  
17 premeditation. (Petition, at p. 15). In the order of August 19, 2010, this Court ruled that Grounds 5,  
18 6, and 7 were unexhausted. (ECF No. 35). This Court granted petitioner a stay so that he could  
19 return to state court to exhaust Grounds 5, 6, and 7. (ECF No. 55). Petitioner filed a second post-  
20 conviction habeas petition in the state district court on February 18, 2011. By order filed June 17,  
21 2011, the state district court denied petitioner's second state habeas petition as untimely. On  
22 February 8, 2012, the Nevada Supreme Court affirmed the denial of petitioner's second state habeas  
23 petition as untimely, successive, abuse of the writ, and barred by laches. (ECF No. 63). Remittitur  
24 issued on March 5, 2012.

25 "Procedural default" refers to the situation where a petitioner in fact presented a claim to the  
26 state courts but the state courts disposed of the claim on procedural grounds, instead of on the  
27 merits. A federal court will not review a claim for habeas corpus relief if the decision of the state  
28

1 court regarding that claim rested on a state law ground that is independent of the federal question  
2 and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

3 The *Coleman* Court stated the effect of a procedural default, as follows:

4 In all cases in which a state prisoner has defaulted his federal claims  
5 in state court pursuant to an independent and adequate state  
6 procedural rule, federal habeas review of the claims is barred unless  
7 the prisoner can demonstrate cause for the default and actual prejudice  
as a result of the alleged violation of federal law, or demonstrate that  
failure to consider the claims will result in a fundamental miscarriage  
of justice.

8 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural  
9 default doctrine ensures that the state's interest in correcting its own mistakes is respected in all  
10 federal habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9<sup>th</sup> Cir. 2003).

11 The claims raised in Grounds 5, 6, and 7 of the federal petition are the same claims that  
12 petitioner raised in his second post-conviction state habeas petition. The state district court denied  
13 the petition as untimely pursuant to NRS 34.726, successive pursuant to NRS 34.810(2), and as  
14 barred by laches pursuant to NRS 34.800. The Nevada Supreme Court also found the petition  
15 untimely pursuant to NRS 34.726(1), successive pursuant to NRS 34.810(1)(b)(2), an abuse of the  
16 writ pursuant to NRS 34.810(2), and barred by laches pursuant to NRS 34.800(2). The Nevada  
17 Supreme Court concluded that petitioner failed to demonstrate good cause to excuse the procedural  
18 bars. The Nevada Supreme Court rejected appellant's argument that inadequate access to the library  
19 at Ely State Prison was good cause to excuse the procedure bars. The Ninth Circuit Court of  
20 Appeals has held that the application of the procedural bars at issue in this case constitute  
21 independent and adequate state law grounds. *See Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9<sup>th</sup>  
22 Cir. 1996); *see also Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9<sup>th</sup> Cir. 2003); *Bargas v. Burns*, 179  
23 F.3d 1207, 1210-12 (9<sup>th</sup> Cir. 1999). This Court finds that petitioner's second state habeas petition,  
24 which asserted the same claims as Grounds 5, 6, and 7 of the federal petition, was procedurally  
25 defaulted on independent and adequate state law grounds.

26 If a claim is procedurally defaulted in state court, federal habeas review is barred unless the  
27 petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged  
28 violation of federal law, or demonstrate that failure to consider the claims will result in a

1 fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. To demonstrate cause for a  
2 procedural default, the petitioner must be able to “show that some *objective factor external to the*  
3 *defense* impeded” his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488  
4 (emphasis added).

5 In the reply, petitioner asserts that an error made during the litigation of his second state  
6 habeas petition constitutes cause and prejudice to excuse the procedural default. Specifically,  
7 petitioner alleges that after he filed his second state habeas petition attempting to exhaust Grounds  
8 5, 6, and 7 in the state district court, a clerical error was made by the state district court, whereby the  
9 docket reflected that petitioner was represented by counsel, when in fact, he was not represented.  
10 Petitioner states that this error prevented him from participating in the case and deprived him of  
11 access to the courts. (Reply, at ECF No. 74). Assuming the truth of petitioner’s assertion, the  
12 clerical error regarding the second state habeas petition could not have been cause to excuse the  
13 untimeliness of Grounds 5, 6, and 7, because the second state habeas petition, filed February 18,  
14 2011, was already untimely on the date it was filed, as it was filed ten years after the issuance of  
15 remittitur from the direct appeal. The alleged clerical error by the state district court, regarding  
16 whether petitioner was represented by counsel in the second state habeas proceeding, occurred after  
17 that petition had been untimely filed by ten years, and therefore could not have been an objective  
18 factor that impeded petitioner’s efforts to comply with state procedural rules. *See Murray*, 477 U.S.  
19 at 488.

20 Petitioner also asserts that the law library at Ely State Prison impeded his efforts to comply  
21 with state procedural rules. Petitioner asserts that the library at Ely State Prison is “insufficient” and  
22 prevented him from obtaining specific legal materials regarding Grounds 5, 6, and 7. Petitioner’s  
23 arguments regarding insufficient access to an allegedly deficient prison law library fail to explain  
24 why petitioner could not have raised his claims either on direct appeal or in his first habeas petition,  
25 in both of which, he was represented by counsel. Petitioner has failed to demonstrate that any lack  
26 of access to the law library or any deficiency in the Ely State Prison’s library constituted an external  
27 factor that impeded his efforts to comply with state procedural rules. Petitioner has shown neither  
28 cause and prejudice, nor that failure to consider Grounds 5, 6, and 7 will result in a fundamental



1 miscarriage of justice. This Court finds that the claims raised in Grounds 5, 6, and 7 of the federal  
 2 habeas petition were procedurally defaulted in state court. As such, Grounds 5, 6, and 7 are subject  
 3 to dismissal with prejudice as procedurally barred.

## 4 **2. Merits Analysis of Grounds 5, 6, and 7**

5 Even if Grounds 5, 6, and 7 were not procedurally barred, these grounds have no merit. In  
 6 an abundance of caution, the Court now analyzes the merits of Grounds 5, 6, and 7 of the federal  
 7 petition.

### 8 **a. Ground 5**

9 Petitioner alleges that there was no evidence corroborating the testimony of a State witness  
 10 regarding his conviction for murder and conspiracy to commit murder. (Petition, at p. 11).

11 When a habeas petitioner challenges the sufficiency of evidence to support his conviction,  
 12 the court reviews the record to determine “whether, after viewing the evidence in the light most  
 13 favorable to the prosecution, any rational trier of fact could have found the essential elements of the  
 14 crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jones v. Wood*,  
 15 207 F.3d 557, 563 (9th Cir. 2000). The *Jackson* standard does not focus on whether a correct guilt  
 16 or innocence determination was made, but whether the jury made a rational decision to convict or  
 17 acquit. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). Under the *Jackson* standard, the prosecution  
 18 has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296  
 19 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents “a  
 20 high standard” to habeas petitioners claiming insufficiency of the evidence. *Jones v. Wood*, 207  
 21 F.3d 557, 563 (9th Cir. 2000).

22 Sufficiency claims are limited to a review of the record evidence submitted at trial. *Herrera*,  
 23 506 U.S. at 402. Such claims are judged by the elements defined by state law. *Jackson*, 443 U.S. at  
 24 324, n.16). The reviewing court must respect the exclusive province of the fact-finder to determine  
 25 the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from  
 26 proven facts. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9<sup>th</sup> Cir. 1996). The district court must  
 27 assume the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the  
 28 determination does not appear on the record, and must defer to that resolution. *Jackson*, 443, U.S.

1 at 326. The United States Supreme Court has recently held that “the only question under *Jackson* is  
 2 whether [the jury’s] finding was so insupportable as to fall below the threshold of bare rationality.”  
 3 *Coleman v. Johnson*, 132 S.Ct. 2060, 2065, \_\_\_ U.S. \_\_\_ (per curium) (2012).

4 On direct appeal, the Nevada Supreme Court considered and rejected the claim that there  
 5 was insufficient corroborating evidence to support petitioner’s conviction for murder:

6 The record contains sufficient independent evidence to corroborate the  
 7 accomplices’ testimony that Nasby committed murder. Among other  
 8 things, two witnesses testified that Nasby admitted to them that he  
 9 killed Michael and there was expert testimony that the weapon found  
 10 at Nasby’s residence was the murder weapon. We therefore conclude  
 that a reasonable jury could have been convinced of Nasby’s guilt of  
 murder beyond a reasonable doubt based on the corroborative  
 evidence that connects Nasby to the murder.

11 (Exhibit 4, at p. 3). Regarding petitioner’s argument that there was no corroborating evidence of  
 12 conspiracy to commit murder, the Nevada Supreme Court ruled:

13 “[T]o sustain a conviction of conspiracy there must be independent  
 14 proof of an agreement among two or more persons.” *Myatt v. State*,  
 101 Nev. 761, 763, 710 P.2d 720, 722 (1985). It is difficult to find  
 15 direct evidence of a conspiracy. Therefore, it often must be  
 established “by inference from the conduct of the parties.” *Doyle*, 112  
 16 Nev. at 894, 921 P.2d at 911. Furthermore, a conspiracy conviction  
 may be proved by “‘a coordinated series of acts,’ in furtherance of the  
 17 underlying offense, ‘sufficient to infer the existence of an  
 agreement.’” *Id.* (quoting *Gaitor v. State*, 106 Nev. 785, 790 n. 1, 801  
 18 P.2d 1372, 1376 n.1 (1990)).

19 There was sufficient testimony to corroborate Deskin’s testimony that  
 20 there was an agreement. Specifically, a witness testified that Nasby  
 told her that he and three other people took Michael to the desert to  
 21 shoot a new gun and Nasby shot Michael twice in their presence. The  
 witness further testified that Nasby told her that, as they got in the car  
 22 to leave, someone said to get out and get the shells; however, Nasby  
 got out and shot Michael a third time before they left. We therefore  
 23 conclude that a jury could be convinced of Nasby’s guilt of a  
 conspiracy to murder beyond a reasonable doubt based on the  
 corroborative evidence together with Deskin’s testimony.

24 (Exhibit 4, at pp. 3-4). The factual findings of the state court are presumed correct. 28 U.S.C. §  
 25 2254(e)(1). This Court finds that, after viewing the evidence in the light most favorable to the  
 26 prosecution, any rational trier of fact could have found the essential elements of murder and  
 27 conspiracy to commit murder, beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. at 319.  
 28 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court’s ruling was

1 contrary to, or involved an unreasonable application of, clearly established federal law, as  
2 determined by the United States Supreme Court, or that the ruling was based on an unreasonable  
3 determination of the facts in light of the evidence presented in the state court proceeding. Federal  
4 habeas relief is denied as to Ground 5 of the petition.

5 **b. Ground 6**

6 Petitioner alleges that the trial court failed to provide a cautionary instruction to the jury  
7 regarding accomplice testimony. (Petition, at p. 13).

8 To obtain federal habeas relief based on an improper jury instruction, petitioner must  
9 establish that the instruction, or failure to give an instruction, so infected the entire trial that the  
10 resulting conviction violates due process. *Masoner v. Thurman*, 996 F.2d 1003, 1006 (9<sup>th</sup> Cir.  
11 1993); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).  
12 In reviewing jury instructions, the court inquires as to whether the instructions as a whole were  
13 misleading or inadequate to guide the jury's deliberation. *U.S. v. Garcia-Rivera*, 353 F.3d 788, 791  
14 (9<sup>th</sup> Cir. 2003) (citing *United States v. Frega*, 179 F.3d 793, 806 n.16 (9<sup>th</sup> Cir. 1999) (internal  
15 citations omitted). An instruction may not be judged in isolation, "but must be considered in the  
16 context of the instructions as a whole and the trial record." *Id.* Furthermore, jurors are presumed to  
17 follow the instructions that they are given. *U.S. v. Olano*, 507 U.S. 725, 740 (1993). Even if an  
18 instructional error is found, it is subject to harmless error review. *Calderon v. Coleman*, 525 US.  
19 141 (1998) (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). The question on federal habeas  
20 review is whether the instructional error had a "substantial and injurious effect or influence in  
21 determining the jury's verdict." *Id.* In the present case, petitioner cites to no United States Supreme  
22 Court authority that dictates the necessity of a cautionary instruction to the jury regarding  
23 accomplice testimony. Moreover, petitioner has failed to show the absence of such an instruction  
24 infected the entire trial so that the resulting conviction resulted in a violation of due process.  
25 Federal habeas relief is denied as to Ground 6.

26 ///

27 ///

28 ///

1 **c. Ground 7**

2 Petitioner alleges that the trial court gave an erroneous “*Kazalyn* instruction” regarding  
3 premeditation. (Petition, at p. 15). The Nevada Supreme Court rejected this claim on the following  
4 basis:

5 Finally, Nasby asserts that the trial court erroneously used instructions  
6 similar to those used in *Kazalyn v. State*, 108 Nev. 67, 75-76, 825  
7 P.2d 578, 582-84 (1992), rather than the instruction adopted by this  
8 court in *Byford v. State*, 116 Nev. \_\_\_, 994 P.2d 700 (2000).

9 This court, in *Byford*, considered the *Kazalyn* instruction and set forth  
10 more preferable instructions for future cases. In *Bridges v. State*, 116  
11 Nev. \_\_\_, 6 P.3d 1000 (2000), this court held that, because *Bridges*  
12 was tried prior to the *Byford* decision, additional instruction pursuant  
13 to *Byford* was not required. Furthermore, in *Garner v. State*, 116 Nev.  
14 \_\_\_, 6 P.3d 1013 (2000), this court held that “with convictions  
predating *Byford*, neither the use of the *Kazalyn* instruction nor the  
failure to give instructions equivalent to those set forth in *Byford*  
provides grounds for relief.” 116 Nev. at \_\_\_, 6 P.3d at 1025.

Nasby’s argument is without merit. Nasby was tried prior to the  
decision in *Byford*. As such, the *Byford* instructions were not  
required and the instructions that were given were sufficient.

15 (Exhibit 4, at pp. 6-7). Because petitioner’s conviction predates the *Byford* decision, there can be no  
16 due process violation based on the trial court’s failure to give instructions consistent with the *Byford*  
17 decision. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court’s  
18 ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as  
19 determined by the United States Supreme Court, or that the ruling was based on an unreasonable  
20 determination of the facts in light of the evidence presented in the state court proceeding. Federal  
21 habeas relief is denied as to Ground 7 of the petition.

22 **IV. Certificate of Appealability**

23 District courts are required to rule on the certificate of appealability in the order disposing of  
24 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and  
25 request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal,  
26 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup>  
27 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v.*  
28 *Mikels*, 236 F.3d 550, 551-52 (9<sup>th</sup> Cir. 2001). Generally, a petitioner must make “a substantial

1 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28  
2 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must  
3 demonstrate that reasonable jurists would find the district court's assessment of the constitutional  
4 claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold  
5 inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of  
6 reason; that a court could resolve the issues differently; or that the questions are adequate to deserve  
7 encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this Court’s  
8 denial of the petition debatable or wrong. The Court therefore denies petitioner a certificate of  
9 appealability.

10 **V. Conclusion**

11 **IT IS THEREFORE ORDERED** that the remaining grounds of the federal petition for a  
12 writ of habeas corpus are **DENIED**.

13 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
14 **APPEALABILITY**.

15 **IT IS FURTHER ORDERED** that the Clerk of Court **SHALL ENTER JUDGMENT**  
16 **ACCORDINGLY**.

17 DATED this 7th day of November, 2014.

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20   
21 LARRY R. HICKS  
22 UNITED STATES DISTRICT JUDGE  
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